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Supreme Court of the United States

OCTOBER TERM, 1957

No. 608

J. A. ROPER AND FRANCES G. ROPER, PETITIONERS,

versus

SOUTH CAROLINA TAX COMMISSION AND OTIS W. LIVINGSTON, CHAIRMAN, JAMES W. CRAIN, JAMES H. SULLIVAN, JAMES A. CALHOUN, JR. AND FRANCIS M. PINCKNEY, CONSTITUTING THE MEMBERS OF THE SOUTH CAROLINA TAX COMMISSION, RESPONDENTS.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The respondents, in opposition to the Petition for the writ of *certiorari* by the Petitioners in this matter, beg to submit the following points and authorities:

STATEMENT

This is an action for recovery of additional taxes for the income tax year of 1951, in the sum of $7,006.00 assessed against Petitioners by the respondents.

The Petitioner, J. A. Roper, since the incorporation of the Roper Motor Company of Easley in 1929 (hereinafter referred to as the Corporation) has owned all of the outstanding capital stock of this corporation, the same being prior to the fall of 1951, 60 shares of common stock with a par value of $100.00 per each share. In the fall of

1951 the charter of the Corporation was amended to include a resolution adopted and approved earlier, which said resolution provided for the issuance of 1,240 shares of perferred stock, each share having a par value of $100.00 to bear interest at the rate of 4% per annum, payable annually. This resolution further provided that accrued dividends were to be cumulative and to be preferred in the liquidation of the corporation over common stock, both as to par value and accumulated dividends, the holders of preferred stock to have no voting rights except in default in the payment of dividends for more than two years, such stock to be callable at $105.00 per share plus dividends accumulated to September 1, 1953, and thereafter callable at any time at par value plus accumulated dividends.

All of this preferred stock was issued as a stock dividend to Petitioner, J. A. Roper, on September 1, 1951 and at the same time appropriate entries were made in the corporation's books on account of the payment of the dividend, the surplus being decreased by $124,000.00 and the capital stock increased by the same amount. The Petitioners did not report this stock as dividend for the year 1951 and upon examination of the return by respondents the additional assessment was made.

The respondents interposed a demurrer to the complaint and the matter came on to be heard by Honorable Steve C. Griffith, Presiding Judge of the Court of Common Pleas of the Thirteenth Judicial Circuit of South Carolina, on November 22, 1954, who, thereafter filed his Order sustaining the demurrer of respondents.

His Honor, Judge Griffith, in sustaining the demurrer thereby sustained the position argued by respondents, which is to say, that respondents were not bound by the Federal Constitutional limitation of a Federal income tax law on certain types of stock dividends and, absent a specific exemption in the State law covering stock dividends, a

stock dividend, where made under the circumstances alleged in the complaint, is income within the meaning and intendment of the South Carolina Income Tax Act, and thereby rejected the position argued by Petitioners which is to say, that since the South Carolina Income Tax Act was modeled largely after the Federal Income Tax Act and United States Supreme Court had construed the Federal Act to mean generally that a stock dividend is not "income" and since the Court's decisions had been made and were generally known prior to South Carolina's adoption of the Federal law, the Legislature of this State is presumed to have intended the adoption of this Court's definition of income. On the other hand, by sustaining the demurrer of respondents the Presiding Judge thereby concluded that the imposition and collection of the tax by the State of South Carolina was legal and proper under the circumstances set forth and alleged by Petitioners.

The matter was appealed by Petitioners to the Supreme Court of South Carolina which affirmed the opinion of Judge Griffith that the preferred stock dividend issued to the holder of all the common stock was income subject to taxation by the State of South Carolina under its income tax law. Petition for Re-hearing was filed with the South Carolina Supreme Court which was refused by that Court on August 20, 1957.

THE DECISION OF THE SOUTH CAROLINA SUPREME COURT DID NOT DEPRIVE THE PETITIONERS OF DUE PROCESS OF LAW OR EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

This matter does not raise any substantial, novel, or undecided federal question of law to meet the requirements of the rules of this Court (Rule No. 19) pertaining to the issuance of Writs of *Certiorari*.

The main contention of the Petitioners is that the decision of the South Carolina Supreme Court in holding the preferred stock dividend issued to the holder of all the common stock to be taxable income under the South Carolina Income Tax Act is a declaration as "income" of that which has been declared not to be income under decisions of this Court and, therefore, is a denial of equal protection of the law and also amounts to depriving Petitioners of their property without due process of law in violation of the Fourteenth Amendment to the United States Constitution. The real distinction, as we understand it, between the right of the United States to tax such a dividend and the right of a State in connection therewith lies in the question whether, in the federal instance, the stock dividend constitutes income within the Sixteenth Amendment to the United States Constitution.

As a matter of fact, the highest Courts of several of the respective States have held stock dividends to be properly subject to the income tax laws of these States. Among these cases are the following: *Tax Commissioner v. Putnam (Tietra v. Putnam)* (1917), 227 Mass. 522, L. R. A. 1917 F, 806, 116 N. E. 904; *Wilder v. Tax Commissioner*, 234 Mass. 470, 125 N. E. 689; *Tilton v. Tax Commissioner*, 238 Mass. 596, 131 N. E. 219; *Lanning v. Tax Commissioner*, 247 Mass. 496, 142 N. E. 829 and *State ex rel. Dalaney v. Nugaard*, 174 Wis. 597, 183 N. W. 884.

While the highest Courts of the several states, in numbers of instances among which are set forth, *supra*, have held stock dividends to be properly subject to a State income tax, the decisions of this Court, on the other hand, dealing with the matter of the taxability of stock dividends under the Federal statutes, have generally held that stock dividends are nontaxable under the Internal Revenue Statutes and the Sixteenth Amendment to the United States Constitution because of the limitation contained in said

Amendment. Among the decisions of this Court dealing with this matter are *Strassburger v. Commissioner of Internal Revenue*, 63 S. Ct. 791, 318 U. S. 604, 141 A. L. R. 1335; *Eisner v. Macomber*, 252 U. S. 189, 64 L. Ed. 421, 40 S. Ct. 189, 9 A. L. R. 1570; *Helvering v. Griffiths*, 63 S. Ct. 636, 318 U. S. 371, but as we have pointed out, *supra*, in all of these cases, the real question was whether the stock dividend constituted income within the Sixteenth Amendment to the United States Constitution.

This Court, in its landmark case dealing with the taxability of stock dividends under Federal statutes and the Sixteenth Amendment, that is in *Eisner v. Macomber*, *supra*, had therein presented to it by the government in support of the government's contention that the stock dividend therein was subject to a United States income tax, the case among the State decisions, which is the landmark case on this subject, *Tax Commissioner v. Putnam (Trefry v. Putnam)*, *supra*. The government, in the *Eisner case* argued the fact that the State of Massachusetts in the *Putnam case* held a stock dividend to be taxable and that such decision should lend support to its contention for the tax sought to be imposed by the United States. However, this Court in holding that the stock dividend was not taxable under the Federal statute and the Sixteenth Amendment had this to say:

> "The Massachusetts Court was not under any obligation, like the one which binds us, of applying a constitutional amendment in the light of other constitutional provisions that stand in the way of extending it by construction."

Thus it will be readily seen that this Court, in the *Eisner case* itself, recognized a distinction between the right of the government to tax a stock dividend as income, on the one hand, because of the restrictive provisions of the United States Constitution, and the right of the States to

subject a stock dividend to an income tax, on the other hand, which is precisely what we have in the instant matter, that is, the State subjecting the stock dividend to its income tax.

Most important, in support of their contention and, in fact, entirely decisive of the matter that the Petition for a Writ of *Certiorari* should be denied herein the respondents call attention of this Court to the fact that this Court, on October 10, 1938, denied *certiorari* in *Brink v. Commissioner of Corporations and Taxation* (1938), 299 Mass. 280, 13 N. E. (2d) 2 (Writ of *Certiorari* denied in 1938), 305 U. S. 616, 83 L. Ed. 399, 59 S. Ct. 75. In the *Brink case* the Massachusetts Supreme Court, in holding a stock dividend to be subject to the Massachusetts income tax, had this to say:

> "Under the constitution and the laws of this Commonwealth, stock dividends may be taxed as income. Such a scheme of taxation violates no constitutional right of the taxpayer. *Tax Commissioner v. Putnam*, 227 Mass. 522, 534, 116 N. E. 904, L. R. A. 1917 F, 806; *Wilder v. Tax Commissioner*, 234 Mass. 470, 125 N. E. 689; *Tilton v. Tax Commissioner*, 238 Mass. 596, 598, 131 N. E. 219; *Lapham v. Tax Commissioner*, 244 Mass. 40, 138 N. E. 708; *Lanning v. Tax Commissioner*, 247 Mass. 496, 142 N. E. 829. The rule is different under decisions of the Supreme Court of the United States. The Constitution of the United States, in this respect, does not impose a limitation upon the taxing power of this Commonwealth. This taxing power is reserved to the several States as an attribute of sovereign power, and no federal question is involved. In this particular, decisions of this Court are final as to the construction of the statutes of this Commonwealth. *Eisner v. Macomber*, 252 U. S. 189, 40 S. Ct. 189, 64 L. Ed. 521, 9 A. L. R. 1570; *Dane v. Jackson*, 256 U. S. 589, 41 S. Ct. 566, 65 L. Ed. 1107; *Stebbens v. Riley*, 268 U. S. 137, 45 S. Ct. 424, 69 L. Ed. 884, 44 A. L. R. 1454; *Posados v. Warner; Barnes and Company*, 279 U. S. 340, 346, 49 S. Ct. 333, 73 L. Ed. 729. Therefore, the

decision of *Eisner v. Macomber*, 252 U. S. 189, 40 S. Ct. 189, 64 L. Ed. 521, 9 A. L. R. 1570 is not binding upon this Court but the decisions of *Tax Commissioner v. Putnam*, 227 Mass. 522, 523, 116 N. E. 904, L. R. A. 1917 F, 806 and *Lanning v. Tax Commissioner*, 247 Mass. 496, 142 N. E. 829, must be accepted as final."

A review of the foregoing will reveal that highlighted in the *Brink* decision, *supra*, among other things, are these specific pronouncements by the Massachusetts Supreme Court, that is to say (1) that the State of Massachusetts was not bound by the case of *Eisner v. Macomber*, a decision of this Court holding stock dividends not to be subject to the imposition of a United States income tax for the reasons therein clearly stated and (2) that no constitutional right of the taxpayer was violated under the Massachusetts scheme of taxation and under its constitution and laws permitting the taxation of stock dividends as income.

Certiorari should be denied in the instant matter just exactly like it was denied in the *Brink case, supra*, for the reason that the same holding was made by the Massachusetts Supreme Court as was made by the South Carolina Supreme Court, that is, that under the State law a stock dividend was subject to the State income tax and further that no constitutional right of the taxpayer was denied him in so holding; that the several decisions of this Court (wherein stock dividends were declared not to be income and not subject to a United States income tax) were not binding on the State, the several States not being restricted by the provisions of the Sixteenth Amendment to the United States Constitution as is the federal government. *Certiorari* was denied by this Court in the *Brink case, supra*, and in so doing this Court thereby disposed of similar questions to those presented in the Petition for Writ of *Certiorari* in the instant matter adverse to the contention of the Petitioners.

CONCLUSION

For the above reasons we do not see any novel, important, or substantial, undecided federal question that meets the requirements of Rule 19 of the Court governing the issuance of Writs of *Certiorari*.

It is settled that the several States are not bound by the constitutional limitation of the Sixteenth Amendment in imposing their income taxes.

Petitioners have had a full and complete opportunity to present their case in both the Court of Common Pleas of South Carolina and also in the Supreme Court of the State of South Carolina which courts considered all aspects of the matter and rendered decisions which in no way deprive Petitioners of their property without due process of law and which in no way deny to Petitioners the equal protection of the law.

We respectfully ask the Court to deny the writ.

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